

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-6096 76-6096
8/9/76

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-6096

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
BOARD OF EDUCATION OF THE CITY
OF NEW YORK, ET AL.
Defendants,

-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS,
LOCAL 1, AFSA, AFL-CIO, ET AL.,
Intervenors-Appellants,

-and-

COMMUNITY SCHOOL BOARD, DISTRICT 26,
Intervenors-Appellants.

-and-

UNITED STATES OF AMERICA,
Petitioner-Appellee,

-against-

SOLOMON DEREWETSKY, ET AL.
Respondents-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT,
COMMUNITY SCHOOL BOARD, DISTRICT 26

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To Be argued by

COSMO J. DI TUCCI

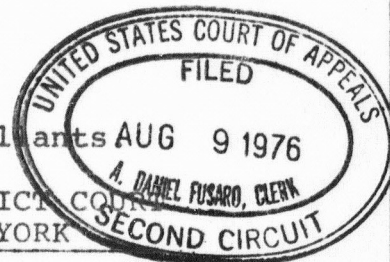


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STATEMENT OF ISSUES

In addition to the issues set forth in the brief of the plaintiff-appellee, appellant respectfully sets forth to this court that the following additional issue of major importance is presented in this action.

1. Whether the investigation of HEW and OCR in this particular instance is a criminal investigation? If the investigation was initiated as a result of claims of violation of the Civil Rights of various complainants and if such investigation is aimed at ascertaining or discovering whether such violations actually did occur then the investigation is criminal in nature since criminal charges could be brought against various individuals in the New York City School System and the entire proceeding must be conducted within the framework of the protections provided by the Constitution of the United States. Due process must be afforded all of the targets of the investigation. Should the investigation be a simple compliance survey naturally, other rules and regulations would apply.

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

While the government's preliminary statement repeatedly refers to the investigation in the within matter as a compliance survey conducted under the authority of the enabling legislation by HEW and OCR (See Page 2 of Brief for the plaintiff-appellee, 1st paragraph continuing to top of page 3) it would appear from the minimal proceedings conducted to date that in actuality the investigation was initiated as a result of various allegations of claimed violations of the civil rights of various individuals either within or applying for participation in the New York City School System. It further appears that this investigation was undertaken to determine if such violations exist or have occurred (see report of Special Master Simon Chrein, dated May 27th, 1976 at page 6, paragraph #3)"...At the time OCR advised defendants of the existence of various complaints alleging violations of law respecting illegal discriminations on the grounds of race, color, ethnic origin, sex and handicaps in the N.Y.C. Public School System. ..." and the report of Special Master Simon Chrein dated July 2, 1976 at page 8 "in this case HEW and OCR are involved in an extended investigation of possible discrimination in the public school system of New York City and now seek specific facts which will aid them in determining if any school board, its members and/or employees have engaged in acts of discrimination or violations of the civil rights of various complainants."

If this investigation is criminal in nature as has been found by the Special Master appointed to determine the facts in

this case on two separate occasions then it must be conducted within the framework of the safeguards provided by the constitution. Due process must be afforded each of the individuals who might be or become targets of the investigation. HEW and OCR cannot be allowed by this court to secret or cover up there actual intent and purposes by reference to other legal procedures requiring less stringent protections and/or guideline. This record is replete with claims by the government that the investigation is criminal in nature in instances where it will suit the governments purposes and simply a compliance survey under the framework of the OCR when it will better suit the purposes of the government.

A. Before the government may be allowed to utilize any of the information it has gathered we must determine the nature of the investigation and whether or not the government has complied with the constitutional guidelines and protections imposed upon it by the Constitution of the United States.

B. If the investigation in this matter was simply a compliance survey as the government would have us believe then all of the agents, employees and subordinates of the central board might be bound by its agreement to comply. However, since the Special Master has clearly established that the investigation is criminal in nature the targets of the investigation cannot be compelled to participate in fact or information gathering which might be used in an eventual criminal proceeding against them without affording them the due process of the laws and the protections provided by the Constitution of the United States.

C. Appellant finds it difficult to understand how the lower court could grant intervention to both intervenors in this proceeding and simultaneously therewith deny both intervenors an opportunity to be heard on the issued. A review of the proceedings will show that while both intervenors were granted there application neither were afforded an opportunity to be heard on the issued; that the only participant at the initial hearing at which the issues were decided was the Central Board of Education; that while the Special Master found that the school boards, their members and/or employees were the targets of the investigation to determine possible discrimination in the Public School System (see pg. 8 item VI) the court did not see fit to reopen the hearing and afford these targets an opportunity to be heard.

ARGUMENTS

ARGUMENT NO.1

REPLY TO ARGUMENTS II AND III
OF BRIEF FOR PLAINTIFF-APPELLEE

The Fifth amendment argument was raised below in the Community School Board, District #26 (hereinafter referred to as School Board) Memorandum of Law submitted in support of the application of the School Board for intervention. Magistrate Chrein in the report of the Special Master dated July 2nd, 1976 acknowledged at page 8, Section VI "the court's injunction order may in limited circumstances require the production of material protected by the Fifth Amendment." The Magistrate continued at page 10 "compliance with the court's injunction order does however require principals, supervisors, teachers and others to make observations and report these observations. Since these observations may form the substance of a more than hypothetically prosecution for the crimes of conspiracy to violate civil rights or violation of civil rights, principals, supervisors and others should be permitted individually to assert a claim of privilege against the requirement to observe and report."

Judge Weinstein in his order of July 15th, 1976 rejected this finding and although granting intervention to the School Board adhered to his original decision and did not reopen the hearing in this matter. The problem presented in this case, among other things, involves whether or not the government can cloak a criminal investigation under the mantle of a compliance survey and in such manner avoid complying with the constitutional restric-

tions imposed on such investigations.

This is a real issue in this case and must be addressed by this court. The principals involved were told they must comply with the court order or go to jail. None were advised of their rights under the Fifth Amendment nor any other rights they might have in the circumstances. No School Board member was ever made a party to the proceeding. Yet all School Boards their members, supervisors and administrators were directed to comply under the threat of incarceration (see letter of May 28th, 1976 by the U.S. Attorney to the members of the Community School Board, the district superintendents, principals and teachers). At the time no School Board nor any of its members was represented by counsel.

While the government may legally conduct investigation permitted enabling legislation the courts must be ever wary of permitting the government a blanket uncontrolled investigative power. Our courts must protect the citizen against all violations of the constitute of the citizens constitutional privileges and must ever be watchful to arrest fraud of half truths by the government or its investigative agencies which attempt to cover up criminal investigations under the mantel of compliance surveys or other such misleading nomenclator. We cannot permit the government or its investigative agencies the right to label a criminal investigation other than what it actually is in order to avoid constitutional sanctions designed to protect the citizens and prevent abuses on the part of the government and its investigative agencies.

While in Argument No.III the government relies heavily on the case of CALIFORNIA V. BYERS 402 U.S. 424 (1970), the Magistrate in his report of July 2nd, 1976 at page 11 stated "In reaching this conclusion, I am aware of the holding in California V. Byers 402 U.S. 424 (1979) that information or gathering statutes, seeking information from the general public are not directed against the class of the public inherently suspected of criminality, did not run afoul of the Fifth Amendment. The situation herein does not involve as a generalized search for information as exists in income tax statutes or accident reporting requirements. Complaints have been made of deprivations of the civil rights of students and others. The study being undertaken as addressed to these complaints, the persons burdened with reporting are potential targets of these complaints and they should therefore, be permitted, if they wish to object to being required to report on there own observations."

Here the objection is not to the disclosure of essentially neutral facts. The objection is to being compelled to participate in information and fact gathering by observation and positive action on the part of the respective individuals which is aimed at ascertaining if any persons civil rights have been violated. We are not dealing with a situation where records are being called for.

School Board objects to being so compelled without due process. School Board does not dispute its obligation to deliver records to the government. Its members however object to being

made parties to an information and fact gathering process without due process of law.

ARGUMENT II

IN REPLY TO ARGUMENT V OF THE BRIEF OF THE
PLAINTIFF-APPELLEE

If, as the government would have us believe, in this argument that the investigation is simply a compliance survey then appellant respectfully submits that the government should have obtained approval of the director of the office of management and budget under the Federal Reports Act of 1942; 44 U.S.C. Section 3309. However, in response to that defense the government claimed the reports were exempt because they were part of OCR'S investigation of complaints alleging possible violations of law. See page 3 of Special Master's Report dated May 27th, 1976 and footnote number two.

The government now and on appeal, should not be permitted to change the character of its investigation to suit its purposes and avoid complying with the constitutional safeguard and restrictions provided in criminal investigations.

ARGUMENT III

IN REPLY TO ARGUMENT VI OF THE BRIEF OF PLAINTIFF-APPELLEE

This investigation is one to ascertain if any members of the New York City School System including members of the various Community School Boards, principals, etc. engaged in or committed any acts violating the civil rights of various unnamed complainants. Under the Education Law of the State of New York Sections 2590 Sub.div. E and 2590 Sub.div. J (4, C & D, among others the responsibility for employing superintendents and other administrative help; for appointing, assigning, promoting and discharging all employees; and for all schools and children attending classes to the Junior High School Grade is placed with the Community School Board and its members.

If this be a criminal investigation then the Central School Board could not waive the right of the various members of the Community School Boards nor could the various members of the boards be subjected to the directive of this court without first being made parties to the proceedings and afforded the due process of the laws granted each individual by the constitution.

In addition these sections of the Education law which place so much responsibility and control with the local school boards require that HEW and OCR comply with sections 80.7 and 80.8 D of the CFR in relation to the various School Boards and particularly Community School Board, District #26 before proceeding for a court order. Therefore, the failure of HEW and OCR to give Community School Board District 26 the ten (10) days notice

required by these sections and their failure to attempt to negotiate voluntary compliance by way of compromise as required by the act is a jurisdictional defect which renders this entire proceeding jurisdictionally defective. For these reasons the local board is not bound by the insurance of compliance nor by the injunction and the injunction is invalid.

CONCLUSION

For the reason stated herein this court must declare the investigations conducted by HEW and OCR in this particular instance unconstitutional and illegal and suppress the same. The governments right to acquire the **racial** and ethnic data sought by the EEO - 5 form and the special compliance report must be restricted particularly when they are sought within the context of a criminal investigation; the injunction order of Judge Weinstein must be vacated and set aside as against the principals and Community School Board, District #26; the information gathered by the government must be suppressed in order to avoid any similar abuses in the future.

DATED: BROOKLYN, N.Y.

AUGUST 9, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF NEW YORK, COUNTY OF KINGS: SS.:

The undersigned being duly sworn, deposes and says:
Deponent is not a party to the action, if over 18 years of age
and resides at Brooklyn, N.Y.

That on August 9th, 1976, deponent served the Reply Brief
on - ~~W. Bernard Richland, Corporation Counsel~~
~~Municipal Bldg.,~~
~~New York, New York 10007~~ @ JN

Frankle & Greenwald, Esqs.
80 Eighth Ave.,
New York, New York 10011

~~David Trager, Esq.~~
~~225 Cadman Plaza East,~~ CGW
~~Brooklyn, New York 11201~~

at the address designated by said attorney for that purpose by
depositing a true copy of same enclosed in a postpaid properly
addressed wrapper, in a post office official depository under
the exclusive care and custody of the United States Postal Service
within the State of New York.

Sworn to before me this

9th day of August, 1976.

Cosmo J. DeLuca

Amelia Hutter

COSMO J. DELUCA
Notary Public, State of New York
No. 4110, 12th
Qualified in Queens County
Commission Expires March 30, 1977

Received Reply Brief for
Appellant, Committee
School Board, District 26

8/9/76 Richard P. Caro
by Stella Majer